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In the Supreme Court of the United States

OCTOBER TERM, 1993

ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND d/b/a TULANE MEDICAL CENTER HOSPITAL AND CLINIC, ET AL., PETITIONERS

v.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Under a provision of the Medicare Act enacted in 1986, 42 U.S.C. 1395ww(h), providers of Medicare services may receive reimbursement for the costs of training programs for interns and residents (known as graduate medical education, or GME, programs) to the extent that those programs contribute to the provision of services to Medicare beneficiaries. Providers are reimbursed yearly on the basis of an inflation-adjusted average per resident cost "recognized as reasonable" for a cost reporting period that began between October 1, 1983 and September 30, 1984 (the base year). See 42 C.F.R. 413.86(e)(1)(A). The question presented is:

Whether the Secretary of Health and Human Services reasonably construed 42 U.S.C. 1395ww(h) to authorize the reaudit of previously approved, but possibly unreasonable or nonallowable, GME costs incurred in the base year for the purpose of determining the reimbursement due in subsequent years.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 987 F.2d 790. The opinion of the district court (Pet. App. 18a-42a) is reported at 799 F. Supp. 1210.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1993. Petitions for rehearing were

denied on June 30, 1993. Pet. App. 43a-45a. The petition for a writ of certiorari was filed on September 28, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In Title XVIII of the Social Security Act, Congress established the federally funded Medicare program to provide health insurance to the elderly and disabled. 42 U.S.C. 1395 *et seq.* Part A of the program provides insurance for inpatient hospital and related post-hospital services.[1] Under the Medicare regulations, the costs of certain educational programs for health professional trainees, including programs for interns and residents known as graduate medical education (GME) programs, are "allowable cost[s]" for which a hospital may receive reimbursement under Medicare Part A. 42 C.F.R. 413.85(a).

Although a provider may receive periodic interim payments from the Secretary, its total allowable Medicare payment is based on a "cost report" that the provider must prepare after the close of its fiscal year. 42 C.F.R. 405.1801. The cost report is filed with a "fiscal intermediary" (usually an insurance company) designated by the Secretary. It shows the provider's costs and the percentage of those costs allocated to Medicare services. 42 C.F.R. 413.20(b), 413.24(f). The intermediary analyzes the cost report, audits it if necessary, and issues the provider a written "notice of program reimbursement" (NPR) containing the final determination of the total amount

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[1] Part B is a voluntary supplementary insurance program covering physicians' charges and other medical services. 42 U.S.C. 1395k, 1395*l*, and 1395x(s) (1988 & 1991 Supp. III).

of reimbursement to be paid for Medicare services during the reporting period. 42 C.F.R. 405.1803.

A provider dissatisfied with the NPR may timely request a hearing before the Provider Reimbursement Review Board (PRRB), 42 U.S.C. 1395*oo*(a) and (b); 42 C.F.R. 405.1835, 405.1837. The Board's decision is "final," unless, within 60 days, the Secretary reverses, affirms, or modifies it. 42 U.S.C. 1395*oo*(f)(1).[2] By regulation, any final determination may be "reopened" within three years (or at any time if there has been fraud) with respect to findings at issue on the determination. 42 C.F.R. 405.1885 and 405.1807.

2. From 1966 through 1982, providers of services under Part A ordinarily were reimbursed for reasonable and necessary direct and indirect costs related to Medicare-covered patient care. 42 U.S.C. 1395f(b)(1). The reasonable cost calculation generally was based on the "cost[s] actually incurred," as long as the services were necessary. 42 U.S.C. 1395x(v) (1988 & 1991 Supp. III). The Act authorized the Secretary to issue regulations defining the reimbursement due under this statutory standard. 42 U.S.C. 1395hh, 1395x(v)(1)(A). In 1983,

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[2] Providers may obtain judicial review of any "final decision" of the PRRB or of the Secretary. 42 U.S.C. 1395*oo*(f)(1). They may also obtain expedited judicial review of any action taken by a fiscal intermediary "which involves a question of law or regulations relevant to the matters in controversy," if the Board determines that "it is without authority to decide the question" or fails to make a timely determination of its authority to decide such a question. 42 U.S.C. 1395*oo*(f)(1). The Board is authorized by regulation, 42 C.F.R. 405.1842(g)(2), to deny expedited judicial review if it finds that the issue on which review is sought is intertwined with disputed factual or legal issues that it is authorized to decide.

Congress introduced a prospective payment system (PPS) which establishes fixed payment rates for various services associated with the inpatient care of program beneficiaries. See 42 U.S.C. 1395ww(d) (1988 & 1991 Supp. III). Costs incurred in connection with GME programs were excluded from the PPS scheme. Until July, 1985, hospital GME costs continued to be reimbursed on a "reasonable cost" basis. 42 U.S.C. 1395ww(a)(4) and (d)(1)(A) (1988 & 1991 Supp. III).

In the Consolidated Omnibus Budget Reconciliation Act (COBRA) of 1985, however, Congress changed the method for calculating GME costs by providing that, subject to appropriate updating, the calculation of GME costs to be reimbursed in all subsequent years would be based on the amount of allowable GME costs incurred by the provider for a fiscal year that began between October 1, 1983 and September 30, 1984 (the base year). See Act of Apr. 7, 1986, Pub. L. No. 99-272, § 9101, 100 Stat. 153-155, 42 U.S.C. 1395ww(h) (the GME Amendment); see also 42 C.F.R. 413.86(e)(1)(A). Specifically, the GME Amendment provides, as the initial step in the reimbursement process, that "[t]he Secretary shall determine [for the base year] the average amount recognized as reasonable" under the Act for direct GME costs for each full-time equivalent resident. 42 U.S.C. 1395ww(h)(2)(A). Congress instructed the Secretary to apply the new methodology retroactively "to hospital cost reporting periods beginning on or after July 1, 1985." § 9202(b), 100 Stat. 175.

3. On September 21, 1988, the Secretary published and invited comment on proposed regulations implementing the GME Amendment. 53 Fed. Reg. 36,589 (1988). Although the Secretary had already reimbursed most hospitals for 1984 GME costs, the

proposed regulations authorized Medicare fiscal intermediaries to reexamine providers' costs from the base year and to conduct a reaudit if the claimed base year costs appeared to include "misclassified or nonallowable costs," or were "unreasonably high." *Id.* at 36,592. The Secretary explained that the agency had reason to believe that some "questionable" claimed GME costs had been "erroneously reimbursed" to providers for the base year. *Id.* at 36,591. Because the Secretary did not want these past mistakes "perpetuated" under the new GME cost reimbursement methodology, the reauditing authority was needed to insure an "accurate" determination of providers' base year GME costs. *Id.* at 39,591-39,592. The Secretary believed that "the provisions of section 1886(h) of the Act would seem to require that we correct these discrepancies in the base period since there is no provision in the law for correcting them later." *Id.* at 36,593.

In the preamble to the final regulations, issued on September 29, 1989 (see 54 Fed. Reg. 40,286–40,301 (1989), codified at 42 C.F.R. 413.86), the Secretary reiterated that it was "hard to believe that Congress intended that misclassified and nonallowable costs continue to be recognized through the GME payment indefinitely." 54 Fed. Reg. 40,301 (1989). The Secretary assured providers that, in reauditing 1984 GME costs, "no new reimbursement principles will be applied * * *; [r]ather, our intent is to ensure that the reimbursement principles in effect during the GME base period were correctly applied." *Ibid.* In response to comments that the reexaminations and reaudits conflicted with the three-year reopening limitation in 42 C.F.R. 405.1885, the Secretary stressed that the reaudits would not be used to recoup erroneous reimbursements for cost reports that had been

settled for more than three years under the reopening regulation. 54 Fed. Reg. 40,302 (1989). Rather, they would be used to recalculate base year costs only for the purpose of computing the amount due in "subsequent years still subject to reopening." *Ibid.*

4. In late 1990, fiscal intermediaries began to conduct redeterminations of GME base year amounts for teaching hospitals that provide Medicare services, including the six petitioners. For example, the reaudit of petitioner Methodist Hospitals of Memphis resulted in a determination that Methodist's allowable GME costs for its base year were $2,785,809, which was $893,841 less than the $3,679,650 in costs the intermediary originally approved on February 28, 1986. C.A. App. 99-100.[3]

5. On August 13, 1991, Methodist appealed the intermediary's notice of reimbursable amount to the PRRB. C.A. App. 110. Methodist challenged both the merits of the reaudit adjustments to the base year cost report and the validity of the GME regulation authorizing the reaudit, *id.* at 110-111. While the administrative appeal was pending, Methodist petitioned the PRRB for expedited judicial review of its facial challenge to the GME reaudit regulation, contending that it raised a purely legal issue that

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[3] Although it was evident that Methodist had received excessive reimbursement for 1984 GME costs, no recoupment action was taken against it by the intermediary or the Secretary because Methodist's 1984 cost report had been settled for more than three years and could not be reopened under 42 C.F.R. 405.1885. See also C.A. App. 99-100. However, the new GME regulation would authorize the intermediary to use the reaudited 1984 GME cost amount to determine Methodist's reimbursable GME amount for all cost reporting years beginning on or after July 1, 1985, for which the three-year reopening period had not already elapsed. See 42 C.F.R. 413.86(e)(1)(iii)).

the Board was not empowered to resolve. *Id.* at 96-98. The Board concluded, however, that Methodist's challenge to the GME reaudit regulation was intertwined with factual issues the Board was competent to decide, and it did not authorize expedited judicial review. *Id.* at 49-50. See 42 C.F.R. 405.1842(g)(2).

6. Notwithstanding the PRRB's decision, Methodist filed suit challenging the validity of the GME reaudit regulation. C.A. App. 20-42. The other petitioners later filed virtually identical lawsuits on similar facts, and all petitioners moved for summary judgment.[4] The district court declared the GME reaudit regulation invalid and granted summary judgment in favor of petitioners. Pet. App. 18a-42a. First, the district court expressed the view that the "plain meaning" of the GME Amendment "does not authorize a reaudit of the 1984 base year costs." *Id.* at 34a. The court concluded that when Congress instructed the Secretary to determine GME costs "recognized as reasonable" in the GME base year, it meant the costs recognized as reasonable as of the termination of the three-year reopening period provided for in the implementing regulations. *Id.* at 36a. Second, relying on this Court's decision in *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204 (1988),

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[4] The Secretary moved to dismiss all the suits for lack of subject matter jurisdiction, and cross-moved for summary judgment on the merits. C.A. App. 3-4. The district court held that the PRRB had failed to make a timely determination of its authority to decide the issue of the validity of the GME reaudit regulation and that the court therefore had jurisdiction to review the regulation under 42 U.S.C. 1395*oo*(f)(1). Pet. App. 26a-33a. The government did not challenge that ruling before the court of appeals, and the jurisdictional issue is not before this Court.

the district court held that the GME reaudit regulation "constituted an unauthorized retroactive rule." Pet. App. 40a.

7. A unanimous panel of the court of appeals reversed. Pet. App. 1a-17a. The court of appeals first rejected the district court's conclusion that the GME reaudit regulation was inconsistent with the "plain meaning" of the GME Amendment. Instead, it agreed with the Secretary that the GME Amendment was either silent or ambiguous with respect to the Secretary's authority to reaudit GME costs to determine the base year amount. *Id.* at 7a-13a.

The court of appeals then sustained the Secretary's construction of the regulation as reasonable. Pet. App. 13a-15a. The court stated that the statutory phrase that would provide the source of the Secretary's reaudit authority—that is, the language authorizing the Secretary to determine the "amount recognized as reasonable under this subchapter"—is "on its face ambiguous." Pet. App. 11a. The court found it "decidedly unclear that the statute meant to allow the Secretary to use only the GME cost figure that would emerge as reasonable through the regular NPR review and three year reopening process." *Ibid.* Rather, "[i]t might just as well have permitted the Secretary the option of using a figure that would be 'recognized as reasonable under this title' at a later time after more careful assessment." *Ibid.* The court concluded that the phrase "recognized as reasonable," by itself, "does not tell us whether Congress means to refer the Secretary to action already taken or to give directions on actions about to be taken." *Id.* at 12a. Indeed, the latter interpretation is, if anything, more plausible, the court reasoned, since the "use of the 1984 figures for the indefinite future" cautions against a "reading of the phrase that allows no elbow

room for adjustments based on prior miscalculations or errors." *Ibid.*; see also *id.* at 14a (noting reasonableness of the agency's belief that, in the course of "erecting a new and more accurate reimbursement methodology," Congress "would resist permanently ingraining misclassified and nonallowable costs in future reimbursements").

Finally, the court of appeals disagreed with the district court's retroactivity ruling, concluding that the GME reaudit regulation "is not an exercise in retroactive rulemaking at all, let alone an impermissible one." Pet. App. 15a. The court noted that the reaudit would have no impact on reimbursements due for GME costs incurred in the base year. Rather, "HHS's regulations simply permit the Secretary to use reaudited versions of those past figures for the purpose of determining reimbursements in succeeding years." Although acknowledging that the 1986 GME Amendment to the Act itself operated retroactively "to alter the reimbursement methodology from July 1, 1985 onward," the court of appeals concluded that "the use of the reaudited 1984 figures in the new methodology" was not "retroactive in its own right." Rather, "the regulations contemplate only the use of past information for subsequent decisionmaking." *Id.* at 17a.

ARGUMENT

The issue in this case is whether the Secretary reasonably construed the GME Amendment to the Medicare Act to permit a redetermination of the reasonable costs of GME training programs in the base year for the purpose of computing the amounts due in subsequent years. In upholding the Secretary's reaudit regulation as a reasonable construction of the statute, the court of appeals correctly applied the familiar principles of *Chevron U.S.A. Inc.* v. *Natural*

Resources Defense Council, Inc., 467 U.S. 837, 842-845 (1984). No other court of appeals has yet addressed this question, and no further review is warranted.

1. a. If a court determines that a congressional enactment directly speaks "to the precise question at issue," the court "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. at 842, 843. If "the statute is silent or ambiguous with respect to the specific issue," however, the court must sustain an agency's interpretation and implementing regulation if it is "based on a permissible construction of the statute." *Id.* at 843.

Here, the court of appeals correctly applied the two-step *Chevron* analysis. First, it carefully examined the language and legislative history of the GME Amendment to determine that Congress had not "directly spoken" to the question of whether the Secretary had the authority to reaudit base year GME costs for the purpose of determining reimbursement in subsequent years. Pet. App. 8a-9a. Specifically, the court concluded that the statutory directive to the Secretary to "determine," for the hospital's base year, the costs "recognized as reasonable under this subchapter [the Medicare Act]," for purposes of determining per resident GME costs in future years, admitted of more than one interpretation. *Id.* at 7a-13a.

Second, the court concluded that the pertinent statutory language could be construed either as commanding the use of the reimbursement amount that had originally been calculated by the fiscal intermediary and had become final prior to the lapse of the three-year reopening period, see 42 C.F.R. 405.1885 and 405.1807, or alternatively, as permitting the use

of an amount more recently determined to be "reasonable" through a reauditing process. Because the court of appeals found "no convincing evidence, direct or indirect, that Congress meant to prohibit corrective reauditing of the 1984 GME cost figures," Pet. App. 9a, the court concluded that it was permissible for the Secretary to adopt the latter interpretation. Further, since the agency could reasonably assume that "Congress would resist permanently ingraining misclassified and nonallowable costs in future reimbursements to health care providers," *id.* at 14a, it was reasonable for the Secretary to adopt an interpretation that would minimize the chance of carrying forward past errors.

b. Petitioners' contrary contention (Pet. 11-18), that the "plain meaning" of 42 U.S.C. 1395ww(h) requires invalidation of the reaudit regulations, is without merit for a number of reasons. That contention rests on petitioners' view (Pet. 12-13) that the statutory phrase "recognized as reasonable *under this subchapter*" for the base year refers to the *procedures* under the Medicare Act for adjudicating the amount of reimbursement the provider could properly receive for that year. The more natural reading of the quoted language, however, is that the phrase "under this subchapter" modifies the word "reasonable," which immediately proceeds it. In other words, a hospital may obtain reimbursement for GME costs only if they are "reasonable" within the meaning of the Medicare Act. See, *e.g.*, 42 U.S.C. 1395f(b)(1), 1395x(v). The word "recognized" then most naturally refers to the process by which the Secretary establishes what will be regarded as "reasonable" GME costs in the base year for the purpose of determining reimbursement in *subsequent* years, under the special statutory GME provisions.

Moreover, petitioners rely (Pet. 12-13) on the fact that a final determination of the total amount of reimbursement due for a given cost year may be reopened only within three years of that final determination. In their view, if the final determination of the total amount of reimbursement due a particular hospital for the 1984 cost year was made more than three years earlier, the reasonable costs for that year are altogether immune from reexamination, even though they may affect reimbursement in future years. Petitioners ignore the significance of the fact that the three-year reopening limit on which they rely is not mandated by statute, but is imposed only by regulation. See 42 C.F.R. 405.1885(a) and 405.1807. The Secretary presumably could amend the regulation to lengthen the reopening period. Here, the Secretary has taken the far more modest step of issuing regulations that provide for the reauditing of base year costs only for purposes of determining the proper amount of reimbursement in subsequent years, without disturbing the total amount of reimbursement the provider received for the services that were rendered in the base year. Thus, if we assume, *arguendo*, that the three-year limit in the reopening regulation would otherwise have the effect petitioners ascribe to it in this setting, that effect has been modified by the reaudit regulation.

Finally, the reaudit regulation is valid even if petitioners are correct that the phrase "under this subchapter" refers to the procedures by which costs are "recognized as reasonable," rather than the source of the substantive standards for determining what costs are reasonable. The procedures the Secretary has adopted in the regulations implementing the GME Amendment were themselves promulgated "under this subchapter"—*i.e.*, under the Medicare

Act, see 42 U.S.C. 1395hh—in order to determine what costs should be "recognized as reasonable" in the specific context of GME reimbursements beginning with the 1985 cost year.

2. Contrary to petitioners' contention (Pet. 18, 25), the Secretary's construction is not inconsistent with principles of fairness and repose. The reaudits authorized by the Secretary's regulations are not used to recoup erroneous reimbursements based on cost reports that have become final and are not subject to reopening. See 54 Fed. Reg. 40,302 (1989) and note 3, *supra*. Rather, the reaudit provides for the recalculation of base year costs only for the purpose of determining the amount due in years for which cost reports are still subject to reopening under the existing reopening regulations. See 42 C.F.R. 405.1885. In this context, it is not unreasonable for the Secretary to deny petitioners the future benefits of HHS's past mistakes, since petitioners can have no settled expectation concerning the amount of reimbursement they will receive for cost reporting periods still subject to the Secretary's review.[5]

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[5] Petitioners contend (Pet. 25) that reauditing the base year after expiration of the four-year period during which providers are required by regulation to retain records is unfair to providers, since they will be unable adequately to document their costs. As petitioners themselves point out, however (Pet. 6), the Secretary has authorized intermediaries to take a flexible approach to calculating the base year amount by authorizing them to look to cost information from later years in estimating the expenses incurred in the base year if satisfactory records from the base year are not available.

Petitioners and other providers remain free to raise challenges to the application of particular auditing principles in

3. Finally, as the court of appeals held (Pet. App. 15a-17a), there is no merit to petitioners' contention that the GME regulation effects an impermissible retroactive rulemaking. See Pet. 25-27. As the district court acknowledged, Congress expressly provided the Secretary with some authority to issue rules retroactively, because it made the GME Amendment (which was enacted on April 7, 1986) applicable to cost reporting periods beginning on or after July 1, 1985. By necessary implication, the procedures for calculating GME costs in the GME regulations that the Secretary subsequently issued in 1989 may be used to calculate reimbursement for cost reporting periods beginning July 1, 1985—subject, of course, to the limitations on reopening contained in the Secretary's own reopening regulations.[6] The intermediary's reaudit of the base year, however, does not introduce any additional element of retroactivity over and above the authority conferred by statute. An action does not have retroactive effect merely because "the facts * * * upon which subsequent action depends * * * are drawn from a time antecedent to the enactment." *Reynolds* v. *United States*, 292 U.S. 443, 449 (1934) (quoted at Pet. App. 16a.) Here, the "subsequent action" (the determination of amounts due the provider for GME expenses incurred after July 1, 1985) depends on antecedent facts (the reasonable amount, as currently calculated, of GME ex-

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their own individual cases. But speculation about those fact-bound matters of audit methodology do not furnish a basis for invalidating the regulations on their face or for seeking review in this Court of the court of appeals' rejection of their facial challenge.

[6] As noted above, the reaudit figures for the base year are not used to recoup reimbursement for any cost reporting year for which the three-year reopening period has elapsed.

penses for the 1984 base year). Because a reaudit of the base year involves only a determination of past facts that operates with prospective effect, it does not effect a retroactive change and is in no way inconsistent with the principles of *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204 (1988).

4. We note as well that Congress has, by statute, specifically recognized the Secretary's implementation of the GME Amendment and, far from disapproving that implementation, has instead chosen only to mitigate its immediate financial impact. Section 4004(a) of the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388-39 (42 U.S.C. 1395 note (Supp. III 1991)), provides:

> (a) **Hospital Graduate Medical Education Recoupment.—**
>
> (1) **In General.**—The Secretary of Health and Human Services may not, before October 1, 1991, recoup payments from a hospital because of alleged overpayments to such hospital under part A of title XVIII of the Social Security Act due to a determination that the amount of payments made for graduate medical education programs exceeds the amount allowable under section 1886(h) [42 U.S.C. 1395ww(h)].
>
> (2) **Cap on Annual Amount of Recoupment.**—With respect to overpayments to a hospital described in paragraph (1), the Secretary may not recoup more than 25 percent of the amount of such overpayments from the hospital during a fiscal year.

The Conference Report makes clear that Congress was fully aware of the Secretary's implementation of

the GME Amendment through recoupment of past payments determined to exceed the amount allowable under 42 U.S.C. 1395ww(h), "expect[ed] the Secretary to recoup overpayments identified as a result of implementing this policy over a four year period," and contemplated that the Secretary would not make continued overpayments following a determination that past payments exceeded the amount permitted by 42 U.S.C. 1395ww(h).[7] In light of Congress's carefully measured response to the very regulatory regime that petitioners challenge, there is no reason for this Court to grant review in order to consider petitioners' contention that that regime was wholly beyond the Secretary's authority to adopt.

5. Petitioners suggest (Pet. 9-10) that the Court should grant review in this case to relieve the federal courts of what petitioners assert will be the burden of resolving appeals that may result from the hundreds of challenges to the Secretary's reaudit adjustments now pending before the PRRB. They also predict that this projected litigation will result in an "inevitable" conflict among the circuits on the legality of the Secretary's regulations. Petitioners' scenario

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[7] See H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess. 719 (1990):

> The conferees note that the Secretary has recently begun to implement the graduate medical education policy enacted in COBRA 85. The conferees expect the Secretary to recoup overpayments identified as a result of implementing this policy over a four year period, after a one year delay. The Secretary may not recoup more than 25 percent of the total amount of such overpayments from a hospital during each of four fiscal years. Nothing in this provision should be construed to require the Secretary to continue to make such overpayments to such hospitals after the initial identification of such an overpayment.

is highly speculative. There currently are no other cases pending in any federal court that present the legal question at issue in this case.[8] The Department of Health and Human Services has informed us that more than 145 of the challenges to reaudits pending before the PRRB have been settled or otherwise disposed of to the satisfaction of providers, and that more such resolutions are expected in the future. It is impossible to predict how many of the remaining administrative appeals before the PRRB will ultimately result in decisions adverse to the provider, how many of those providers would challenge the Secretary's reaudit authority in district court, and how many of those cases would, in turn, reach the courts of appeals. Because it is by no means clear that the issue petitioners raise will actually generate a significant amount of litigation—let alone a circuit conflict—consideration of the issue by this Court at the present time would be premature.[9]

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[8] The district court below consolidated all the pending court cases challenging the facial validity of the GME regulations. See *Mount Sinai Medical Center of Greater Miami, Inc.* v. *Shalala*, No. 92-1963-GHR (D.D.C.); *Reading Hospital and Medical Center* v. *Shalala*, No. 92-2824-TPJ (D.D.C.); *Emanuel Hospital and Medical Center, et al.* v. *Shalala*, No. 92-2876-SS (D.D.C.); and *P/SL Healthcare System* v. *Shalala*, No. 93-0410-LFO (D.D.C.). Denial of the present petition will terminate these cases.

[9] In the course of its consideration of the pending administrative appeals, the PRRB can be expected to articulate general principles regarding procedures, the bases for audits, and determinations of costs "recognized as reasonable" that may serve to eliminate or reduce areas of dispute in entire categories of pending cases. Judicial review of final PRRB decisions in such cases presumably will serve that purpose still further. This accordingly is a situation in which it is

Indeed, the issue arises in an interlocutory posture even in this case. The courts below addressed the validity of the Secretary's regulations implementing the 1986 GME Amendment pursuant to the special statutory authority for a district court to decide a legal issue that arises in a case pending before the PRRB. See note 2, *supra*. All six petitioners still have their administrative appeals pending before the PRRB in which they challenge the Secretary's recalculation of their GME base year amount. Thus, all petitioners could still obtain all the relief they are seeking if the Board determines that the recalculations were in error. In that event, the question of the validity of the reaudit regulations would be moot as regards petitioners.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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especially appropriate for this Court to await developments before the expert administrative tribunal that Congress has vested with authority to address various complex and technical matters, as well as before the lower federal courts.

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